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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 430.

In the Matter

of

The Petition of SPENCER KELLOGG & SONS, INC., as owner of the Motorboat "LINSEED KING," her engines, etc., for Limitation of Liability, Civil and Maritime,

SPENCER KELLOGG & SONS, INC.,

Petitioner,

HILDA M. HICKS, as Administratrix, and others,

Claimants-Respondents.

BRIEF FOR MAY A. AMLAW, AS ADMINISTRATRIX, AND 22 OTHER CLAIMANTS-RESPONDENTS

LUCIEN V. AXTELL and
ELIZABETH ROBINSON,
Proctors for Claimants-Respondents.

ELIZABETH ROBINSON,
Of Counsel.

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SPENCER KELLOGG & SONS, INC.,

Petitioner,

HILDA M. HICKS, as Administratrix, and others,

Claimants-Respondents.

BRIEF FOR CLAIMANTS-RESPONDENTS

This Court granted certiorari to review the affirmance by the Circuit Court of Appeals for the Second Circuit of a decree of the District Court for the Southern District of New York, whereby it was adjudged that the petitioner was liable without limitation for the sinking of its launch "Linseed King" and that certain claimants, respondents herein, were entitled to recover damages for the deaths and personal injuries so caused.

Certiorari was also granted in case No. 444 at the instance of employees of Spencer Kellogg & Sons, Inc., and personal representatives of employees, to review the failure

of the courts below to allow such claimants a recovery in the limitation proceeding, into which they had been brought *in invitum*, their claims having been held justiciable only before the New Jersey Workmen's Compensation Bureau.

The opinion of Hazel, D. J., on the merits is reported in 24 Fed. (2) 967 (R., 122), the opinion of Patterson, D. J., on the status of these claims in 48 Fed. (2) 311 (R., 180), and the opinion of the Circuit Court of Appeals in 52 Fed. (2) 129 (R., 2365).

Statement of Facts.

The petitioner is a New York corporation, engaged in the manufacture of linseed oil. Its principal place of business is in Buffalo, New York. It maintains a factory at Edgewater, New Jersey, on the west shore of the Hudson River, and was the owner of the "Linseed King."

The "Linseed King" was built in 1919 of cedar planking, about an inch in thickness (R., 335). Her measurements, according to the license issued by the Department of Commerce, were length over all 45′, breadth 10′ and depth 4.6′ (Exhibit S). She was equipped with a gasoline engine. This had a small wheel-house forward, slightly raised above the floor of the inclosed cabin which occupied most of the deck space. The sides of the cabin had glass windows, 15 x 22 inches (R., 591), nine on either side, placed 4 feet above the level of the deck (R., 707); two doors on each side gave upon the deck just abaft the wheel-house, which was separated from the cabin by an iron railing. Along each side of the cabin ran a bench seat, capable of holding about 36 men (R., 680). The available floor space for standing was 63 sq. ft. (R., 699). She

had on board 86 life preservers for the carrying of 86 men (R., 746). The vessel had no bulkheads or buoyancy tanks, and the only protection against contact with floating obstacles was a narrow strip of thin metal sheathing (R., 568), her maximum speed was only 7 or 8 miles (R., 351).

The vessel was used as a ferry to transport employees as well as applicants for employment between New York City and Edgewater, N. J.

On the early morning of December 20, 1926, the "Linseed King" left petitioner's plant at Edgewater, N. J., on her customary trip across the Hudson River, to a pier at the foot of 95th Street, New York City, there to take on a large number of workmen as passengers and convey them to the petitioner's plant (R., 4, 123, 352). Some of the passengers were regular employees, while others were mere applicants for employment to unload a vessel, having assembled at the pier at the request of petitioner appearing in advertisements in the New York World (R., 123, 754). It has been estimated that from 78 to 86 persons were crowded into this 45-foot enclosed launch.

Leaving 95th Street, a little after 6:30 A. M., the "Linseed King" proceeded across the Hudson River. It was still dark (R., 4, 392). The river was full of floating ice (R., 342). Reaching midstream, she struck an ice floe with such force that her port bow was stove in, causing an opening approximately 19 inches long and 8¾ inches wide (R., 124). The water poured in rapidly—a panic ensued, and the "Linseed King" sank in less than two minutes (R., 629, 972). About 29 of the men saved themselves by leaping into the river and swimming to ice cakes which supported them until they were rescued (R., 972, 1144, 1276). Twenty-seven bodies were taken from the cabin (R., 1056).

Eleven more bodies were later taken from the river. The bodies of 20, perhaps even more, were never recovered.*

The petitioner on March 4, 1927, instituted a proceeding to limit its liability under Revised Statutes, Sections 4283-4285 and acts amendatory thereof and supplemental thereto (R., 3-9). All persons claiming damage for any loss arising out of or in connection with this disaster were cited to appear in the limitation proceeding and make proof of their claims and answer the petition (R., 31). With this order the claimants duly complied.

The case came on for trial before Hazel, D. J., January 12th to February 1st, 1928. The evidence established the following salient facts:

(1) The vessel was admittedly not fit for navigating the Hudson River during the time of the year when ice was likely to appear therein (petitioner's witnesses—Clayton, R., 472; Aldrich, R., 584).

(2) That there was ice in the Hudson River on the day the vessel undertook the fatal voyage and prior thereto was testified to by some 22 disinterested and very credible witnesses (R., 130). A summary analysis of this testimony is found in the Appendix A of this brief. Moreover, the United States Weather Bureau report for the month of December, beginning with the 2nd, showed alternating periods of freezing and thawing (Exhibit E—R., 2341),—a climatic condition which causes the formation of ice in the Hudson River.

(3) That although the carrying capacity of the "Linseed King," according to the prevailing expert testimony, was from 40 to 60 persons (R., 1015-1020, 1393, 1543), she

*See Appendix C for number of persons who lost their lives.

had in the past carried from 80 to 100 persons and on the day of the disaster from 78 to 86 persons. A summary analysis of the testimony as to the carrying capacity of the "Linseed King" and her overloaded condition is found in the Appendix B and C of this brief.

(4) The vessel was insufficiently manned (R., 789, 977).

"Privity and Knowledge."

The evidence further established that the foregoing acts of negligence took place with the privity and knowledge of petitioner's managing superintendent, Stover, with which petitioner was chargeable. The testimony on this issue comes from petitioner's own witnesses.

The vessel undertook the fatal voyage with the approval and the express authority of petitioner's managing superintended (Rohweder, R., 378, 324-5; Stover, R., 1938). Stover had in fact authorized an advertisement to be inserted in the New York World, requesting men to appear at the 95th Street pier in New York, on the morning of December 20, 1926, to be transported in the "Linseed King" across the Hudson River to Edgewater (R., 755, 789, Exhibit L).

The petitioner knew and expressly authorized the master of the vessel to carry 86 men, and on the day of the disaster she carried approximately that number, with the petitioner's approval (Stover, R., 746; Balz, R., 521; Aldrich, R., 566; Rohweder, R., 344).

After a three weeks' trial, during which 119 witnesses testified (R., 124), Hazel, D. J., found the foregoing acts of negligence and the privity and knowledge of the petitioner, and denied limitation (R., 123-138).

On the authority of *Hartford Accident & Indemnity Co. v. Southern Pacific Co.*, 273 U. S. 207, Judge Hazel ordered the proceeding continued in admiralty before a Special Commissioner for the purpose of assessing the damages of *all* claimants (R., 139).

Hearings before the Special Commissioner began on May 15, 1928, and ended May 27, 1930, and on July 9, 1930, he filed his report awarding damages. He found that since the deaths occurred on navigable waters within the territorial waters of the State of New York, while on a vessel making a voyage from New York to New Jersey, the general maritime law as supplemented by the New York Death Statute determined the right and measure of recovery, and further, that the nature of the limitation proceeding conferred complete jurisdiction upon the admiralty court to award damages to all the claimants without distinction between employees and non-employees (R., 183).

The report of the Special Commissioner came on for hearing on exceptions before Patterson, D. J., who confirmed some of his awards and changed others. Those claimants whom he found to have been in petitioner's employ he remitted to claim under the New Jersey Workmen's Compensation Act. With respect to claimants, respondents herein, who were not employees, he affirmed the ruling of the Special Commissioner, that the general maritime law as supplemented by the New York Deaths Statute governed.

Petitioner appealed from the final decree because of the denial of its limitation and for failure to remit to compensation the group of claimants designated as "Saturday men." Certain claimants also appealed from the dismissal of their claims, remitted to the New Jersey Workmen's

Compensation Bureau. The decisions of Hazel, D. J., on the merits, and Patterson, D. J., as to the status of the claimants were affirmed on appeal (R., 2365-2376).

Summary of Argument.

1. The case is peculiarly one for the application of the general rule so often announced by this Court, both in equity and admiralty cases, that it will not reverse the concurring decisions of two subordinate Courts upon questions of fact, unless there be a clear preponderance of evidence against their conclusions. The evidence is overwhelmingly in favor of claimants on all issues presented.

2. The decision of the Courts below is predicated upon their concurrent finding that the petitioner by its managing superintendent knowingly permitted the "Linseed King" to navigate in the Hudson River on the day of the disaster, at a time of the year when ice was likely to appear therein, and that the petitioner knew that the vessel was unfit by construction for such navigation.

3. The petitioner knowingly permitted the vessel to be so overcrowded that the lives of all on board were seriously endangered, and this overloading of the vessel caused and contributed to the disaster.

4. The obligation of the petitioner to furnish a seaworthy vessel is non-delegable. It was the duty of the petitioner, and not the master, to see that the vessel was seaworthy to transport the passengers which it held out as fit to carry and to meet the usual and expected perils to be encountered on the voyage of December 20, 1926.

5. The "Saturday men" were not employees within the meaning of the New Jersey Workmen's Compensation Act.

The status of employer and employee had never arisen prior to or at the time of the disaster. They were merely preferred applicants for employment. In any event, they were entitled to a recovery in the limitation proceeding under the general maritime law as supplemented by the New York Death Statute.

POINT I.

The unseaworthiness of the "Linseed King" caused the disaster. Her unfitness for the voyage on December 20, 1926, her overloaded condition, her insufficient crew, were within the privity and knowledge of the petitioner.

Unfitness for the Voyage.

Within a very few minutes after the "Linseed King" left her pier, more than 80 men were engulfed in the icy waters of the Hudson River, of whom only 29 survived:

> "That such an appalling calamity could not have occurred without fault somewhere is manifest. Human skill and care could have prevented or mitigated the disaster." (*Van Schaick* v. *United States,* 159 Fed. 847, 851.)

In the case of *The Southwark,* 191 U. S. 1, this Court said:

> "This sudden breakdown when the vessel was scarecely out of port would raise the presumption of unseaworthiness at the time of the sailing, making it incumbent upon the vessel owner to prove seaworthiness, and this independently of the provisions of the Harter Act. *Work* v. *Leathers,* 97 U. S. 379" pp. 13, 14.

It was not an inevitable accident. The "Linseed King" sank after striking ordinary ice floes (R., 319). The presence of ice in the Hudson River during the winter months is reasonably to be expected, and guarded against.

Dittmar v. *Sargent, et al.*, 277 Fed., 237 (C. C. A. 2nd).

In that case the Court held:

> "A man who charters his vessel for harbor navigation in New York and in the winter time must regard careful, proper navigation through ice fields as a use reasonably to be expected" p. 238.

It is for the owners to show affirmatively the safety and sufficiency of the ship's condition when she sails, by making all ordinary and reasonable tests.

The Edwin I. Morrison, 153 U. S. 199;
The Jean Bart, 197 Fed. 1002.

Seaworthiness was defined in *The Southwark,* 191 U. S. 1, as follows:

> "As seaworthiness depends not only upon the vessel being staunch and fit to meet the perils of the sea, but upon its character in reference to the particular cargo to be transported, it follows that a vessel must be able to transport the cargo which it is held out as fit to carry or it is not seaworthy in that respect" p. 9.

In so far as the obligation of seaworthiness is concerned, there is no distinction between a private and a common carrier. The obligation to furnish a seaworthy vessel is the same in each case.

The Addison E. Bullard, 287 Fed. 674 (C. C. A. 2nd).

Petitioner had the burden of proving that the vessel was seaworthy at the commencement of the voyage.

The Benjamin Noble, 244 Fed. 95 C. C. A. 6 C. affd. 249 U. S. 334;
In re Campanhia De Navegacao Lloyd Brasileiro, 7 Fed. (2d) 238.

In re Companhia De Navegacao Lloyd Brasileiro, 7 Fed. (2d) 238, the Court said at page 241:

> "* * * In the petition for limitation of liability the allegation of lack of knowledge and privity carries with it the allegation, or at any rate requires the petitioner to prove, that at the commencement of the voyage the vessel was actually seaworthy, properly officered, manned, equipped, and supplied" p. 241.

Not only did petitioner fail to overcome the presumption of unseaworthiness which arises from the mere happening of the disaster, but the proof overwhelmingly established that the launch was admittedly unseaworthy for the voyage on December 20, 1926—that she was not seaworthy for navigation in the Hudson River when ice was likely to appear therein (Clayton, R., 471-472; Aldrich, R., 584-587).

Petitioner seeks the benefit of the Limited Liability Acts on the ground that it did not know, and had no reason to believe, there was ice in the river on the day of the disaster; and that the responsibility for the operation of an unseaworthy vessel was with the master. It makes no claim, however, of diligence in ascertaining the fact or even of having made provision for such ascertainment.

Section 4283-4285 R. S., U. S. C. A., Title 46, Secs. 183-185, provide for limitation of the shipowner's liability for any loss or damage occasioned or incurred without the privity or knowledge of the owner. The "privity or knowledge," within the meaning of the statute, that will deprive the owner of limitation of his liability, means some fault or negligence on the part of the owner, or knowledge of a condition of things likely to produce or contribute to this loss without adopting the proper means to prevent it.

Butler v. *Boston Steamship Co.*, 130 U. S. 527;
The Republic, 61 Fed. 109;
The Benjamin Noble, 244 Fed. 95, C. C. A. affd. 249 U. S. 334.

In the case of a corporation, such privity or knowledge is that of the officers or managing agents of the corporation. Mr. Stover was the superintendent in charge of petitioner's plant. *To him, and not to Capt. Rohweder, was delegated the responsibility for the operation of the launch* (petitioner's witnesses—Aldrich, R., 585; Balz, R., 546-547; Stover, R., 771-772; Rohweder, R., 378).

Rohweder, a witness on behalf of petitioner, testified:

"Q. You were running this boat on this morning with full authority to run it, and it was your understanding your superiors desired you to run that boat that morning, isn't that so? A. Yes, sir.

Q. And until you received contrary orders, it was your duty, acting for Mr. Stover, to run the boat, is that the way you understood it?

* * * * * * * * *

A. That is right.

Q. And you would stop running it when he told you to knock off? A. Yes" (R., 378).

This is corroborated by the testimony of Mr. Stover himself:

"You told him to meet this boat Monday morning, to have his boat there Monday morning? A. I told him through Mr. McHale to make a trip at 6 o'clock, and then to make his regular trip at 6:30" (R., 1938).

Stover's knowledge is petitioner's knowledge. His privity is that of the petitioner.

Parsons, et al. v. *Empire Trans. Co.*, 111 Fed. 202;
Eastern S. S. Corp. v. *Great Lakes Dredge & Dock Co.*, 256 Fed. 497;
The Benjamin Noble, 244 Fed. 95, C. C. A., 6 C., affd. 249 U. S. 334;
In re Reichert Towing Line, (C. C. A., 2d C.) 251 Fed. 214. Certiorari denied, 248 U. S. 565.

In *Boston Towboat Co.* v. *Darrow-Mann Co.*, 276 Fed. 778 (C. C. A., 1st C., Certiorari denied 258 U. S. 620) substantially the same ruling was made:

"Capt. Nickerson also testified that he was told that he would assume charge of all the floating property of the Towboat Company as assistant manager. The evidence discloses that he was a managing officer of the Towboat Company. Although he was not a corporate officer, his privity or knowledge would be that of the company" p. 781.

In re P. Sanford Ross, Inc., 204 Fed. 248 (C. C. A., 2d):

> "But the petitioner is a corporation, and is charged with the knowledge of its officers or agents who have charge of the particular subject matter. Undoubtedly its high officers were not personally informed as to the details of the equipment of all the vessels belonging to their corporation. But it had a superintendent whose duty it was to see that all vessels were in repair and properly equipped. The petitioner failed to show that the absence of a chock-block was without the knowledge of such superintendent. * * *" pp. 250-1.

The negligence charged and imputed to the petitioner, through its managing superintendent, is that of knowingly sending the "Linseed King" out on a voyage in the Hudson River on December 20, 1926, when ice might be expected in the river (R., 378, 1938) though knowing that the launch was not constructed for navigation through ice (R., 584, 587).

There is ample guidance in the decisions of the courts in determining the degree of care which the petitioner was required to exercise, and without which it could not limit liability.

In *The Jean Bart*, 197 Fed. 1002, the Court said at page 1003:

> "In determining whether or not the claimant discharged in full the duty which it owed to the libellant in providing a seaworthy vessel and in caring for the cargo, the measure of that duty must be considered with reference to the conditions under which it was to be performed. Conduct reasonably prudent under one set of circumstances may be grossly negligent under another," p. 1003.

In *Simmons* v. *New Bedford, et al., Steamboat Co.*, 97 Mass. 367, speaking of the duty imposed upon the carrier of passengers, the Court said:

> "* * * he is bound to use the utmost care which is consistent with the nature of and extent of the business in which he is engaged, in the providing of safe, sufficient and suitable vehicles or vessels and other necessary and appropriate means of transportation, as well as in the management of the same, and he making such reasonable arrangements as a prudent man would make to guard against all dangers from whatever sources arising which may naturally and according to the usual course of things he expected to occur."

And in *Van Schaick* v. *United States*, 159 Fed. 847, the Court said:

> "One who has charge of an ancient wooden building must be held to a higher degree of vigilance in guarding against fire than if the building were built of steel, concrete and stone. So the master of a wooden vessel filled with combustible materials and thronged with hundreds of irresponsible human beings is required to exercise a greater degree of watchfulness than is the commander of a steel vessel carrying the ordinary load of comparatively experienced and intelligent passengers" p. 852.

If petitioner did not know there was ice in the river on December 20, 1926, it did admittedly know that it had a wooden launch whose planks were only a little over an inch thick (R., 335, 351); that she was without watertight bulkheads or buoyancy tanks; that if she came into collision with ice floes she would sink instantly. Petitioner

further knew that her daily cargo were human beings—passengers—toward whom it was bound to exercise the highest degree of care. Yet, knowing all this it made no observation of the daily weather reports (R., 762). It had no watchman stationed outside of its plant to determine the presence of ice in the river (R., 758). Nor did it otherwise inform itself as to the conditions under which ice could ordinarily be expected to come into the river.

Complete neglect in guarding against the danger of navigation in ice is further demonstrated by the fact that the boat had been in previous winters operated when ice was in the river (Stover, R., 738-739), and that petitioner would wait until the ice was actually in the river before laying up the vessel (Stover, R., 758).

Petitioner contends that the facts here are similar to the situation of an ocean steamship speeding in a fog as in the *La Bourgogne*, 210 U. S. 95. The analogy is not good. In the *La Bourgogne* case, this Court ruled that speed in a fog could not be determined by fixed rules and must be left to the discretion of the master and her officers.

It was different as to the appearance of ice in the Hudson River; a duty rested upon the manager of the corporation under whose supervision the boat was operated to guard against ice perils and like dangers apt to arise in the course of her short ferrying trips.

The Virginia, 264 Fed. 986;
Hines v. *Butler*, 278 Fed. 877; (Certiorari denied, 257 U. S. 659).

In *The La Bourgogne* the liability of the owner for the negligent navigation of a seaworthy vessel was in question, whereas here the liability is predicated upon the petition-

er's permitting the "Linseed King" to undertake the voyage when she was *unseaworthy* by construction for navigation in the Hudson River at the season of the year when ice was likely to appear.

In the case at bar, privity is chargeable not through a minor employee but through Mr. Stover, whom the petitioner had placed in charge of the entire plant at Edgewater and who had personal control over the operation of the "Linseed King." A plainer case of *alter ego* cannot be imagined. A further condemnatory circumstance is the fact that the "Linseed King's" trips were made from the plant and back within sight of shore. Mr. Stover had every means of exercising personal supervision both over the management of the "Linseed King" and over the circumstances of her trips. The whole theory of the Limited Liability Acts is to limit the liability of the ship-owner to the value of the vessel at fault where the owner and, in the case of a corporation, the owner's managing representatives are without personal fault and where the only fault involved is that of the master and mariners of a vessel that has gone down below the horizon and out of the immediate control of the owner. No such case is presented here, but on the contrary, the neglect goes home in all its aspects to the managing representative of Spencer Kellogg & Sons, Inc.

The duty of the petitioner to make certain that the vessel is seaworthy for the voyage is non-delegable.

The Edwin I. Morrison, 153 U. S. 199.

And the rule of law is not relaxed merely because the petitioner failed to inform itself of the usual and expected conditions of navigation, to be encountered by its vessel or

because it failed to exercise that degree of care required of a prudent ship-owner.

The Republic, 61 Fed. 109 (C. C. A., 2d);
Texas & Gulf S. S. Co. v. *Parker, et al.*, 263 Fed. 864 (C. C. A., 9th).

The launch was under the immediate supervision of Mr. Stover. He was to determine when the launch was to be laid up and, without his instructions, operation of the boat would not be discontinued (R., 352, 378, 546). There was ice in the river on December 20, 1926, and prior thereto. This was the testimony of some 22 witnesses. Mr. Stover's office was located right on the banks of the river (R., 376, 728). He had ample opportunity for determining the condition of the river and to guard against operating the launch when ice was likely to be present.

There was freezing temperature, according to the weather reports (Exhibits E and F), beginning with the end of December, 1926, and petitioner should have anticipated the possibilities of ice and discontinued the operation of the vessel long before December 20th. It could not speculate as to the presence or absence of ice and risk the lives of the men it undertook to transport.

The Courts have consistently refused to grant limitation of liability whenever the shipowner has failed to take such precaution and to exercise that care which a prudent man would observe to guard against all dangers from whatever sources arising which might naturally and according to the usual course of things be expected to occur.

Eastern S. S. Corp. v. *Great Lakes D. & D. Co.*, 256 Fed. 497;
Parsons v. *Empire Transp. Co.*, 111 Fed. 202 (Certiorari denied; 183 U. S. 699);

Sanbern v. *Wright & Cobb Lighterage Co.*, 171 Fed. 449, 455;
The Teddy, 226 Fed. 498;
Texas & Gulf S. S. Co. v. *Parker, et al*, 263 Fed. 864 (C. C. A., 9th).

In *Texas & Gulf S. S. Co.* v. *Parker, et al.* (supra), the Court said:

> "Conceding that Guyton gave no order to the master to sail, and that the master had the responsibility of deciding, still the evidence tended to show that Guyton knew of the master's decision before the departure of the Pilot Boy, and, if it was a negligent one, knew of the master's negligence. Guyton's knowledge was that of his principal, the appellant, and established privity on the part of the owners, with the negligence of the master, and prevents their limiting their liability for the loss. *The Benjamin Noble*, 244 Fed. 98, 156 C. C. A. 523.
>
> The Pilot Boy may have been seaworthy for ordinary weather. She was not, because of her size and strength, a boat adapted to live out a hurricane. If she left her home port, when her master and manager knew, or should have known, that a tropical hurricane was approaching her path, dangerous for any kind of vessels to approach, and especially one of her limited size and resistance, then the owners would be responsible for her departure from her home port in an unseaworthy condition. * * *" pp. 867-8.

In the case of *Eastern SS. Corp.* v. *Great Lakes Dredge & Dock Co.*, 256 Fed. 497 (C. C. A. 1st C., 1919) limitation of liability was denied because of the failure to anticipate the dangers to follow from the sinking of a drill boat. The Court said at page 504:

"It is contended that the dredge company had no reason to anticipate that the drillboat might sink, and therefore it was not called upon to instruct Folz what to do in such a contingency; but, as it was generally known that vessels in encountering the perils of the sea were liable to be sunk, and also known that drillboats and dredges, supported by spuds, when subjected to like perils, had sunk, we think it was bound to have foreseen that such a situation might arise, and that it should have instructed Folz with reference thereto." p. 504.

The case of *Parsons, et al.* v. *Empire Transp.*, 111 Fed. 202, is even more in point:

"Capt. Barlow, who was employed as captain of one of the appellee's steamers, and whose experience as captain on the Pacific Coast extended over a period of 14 or 15 years, testified that 'a barge of that description has no business in Behring Sea at all'; certainly not, we think, at a season of the year when heavy storms are liable to occur at any time. This fact is virtually admitted by the learned counsel for the appellee in that portion of their brief in which they discuss the lack of authority in Patterson.

* * * Surely, the man to whose management the company's entire fleet of boats in those remote waters, as well as all of its other property in that region, was intrusted, should be regarded as the company's representative, and his dispatch of any of the company's boats to a neighboring point as being at least within his ostensible authority. His knowledge must, therefore, be regarded as his company's knowledge, and his acts as the acts of the company. That it was gross negligence to ship goods from St. Michael to Nome at the beginning of the winter season in barge No. 2 has already been sufficiently shown" pp. 205, 208.

Petitioner's counsel in summing up his case in the District Court sounded the keynote of petitioner's neglect when he said:

> "Now as I have already pointed out, this ice would be discovered on the first trip, when the boat wasn't carrying any men, and nobody would be in danger except the captain himself, which is a risk he might very well take with a light boat going out there, and observing the river to see if it was clear, and if it was clear, there was no danger in his bringing men back" (R., 2009).

Let us consider, then, whether such a system of operation is a prudent one. When the launch started out on her morning trip it was dark. And this is conceded in Paragraph Third of the petition (R., 4). The testimony is uniform, and it is a matter of common knowledge, that ice comes down with the tide, without notice of the exact moment it will appear at a given place in the river. If, then, in crossing the river from Edgewater to New York, the Captain encountered no ice, he could return with the passengers. But what was to happen if on his return from New York and while in midstream, with a boat-load of people, he suddenly found himself in collision with an ice floe—what provision did the petitioner make for guarding against such an event—what provision did it make for its charge of human beings under such circumstances? It was just this so-called "taking a chance" system of the petitioner that brought about this appalling catastrophe.

It was said in *The Virginia,* 264 Fed. 986 (affmd. C. C. A., 4th, 278 Fed. 877, certiorari denied 257 U. S. 659) that a shipowner should be denied the right of limitation:—

> "If the disaster happened in whole or in part because he more or less consciously took a chance or closed his eyes to something he did not want to be bothered about, or because in some other way he fell short of what a fair-minded, well-informed, and impartial man would feel was his moral duty in the premises" p. 997.

The cases relied on by petitioner contain no challenge to this rule.

Overloaded Condition.

The petitioner's liability arises, not only from its deliberate act in causing the launch to embark upon the fatal voyage unequipped by construction to endure the usual and expected perils of the river, but because it suffered the launch to be so overcrowded that the life of every one on board was seriously endangered.

The prevailing expert testimony is that the launch could not carry more than sixty people. But 86 life preservers were provided for the carrying of 86 passengers (Rohweder, R., 344; Balz, R., 521; Aldrich, R., 571), and according to the overwhelming proof 86 men were shut up in that launch when she embarked for Edgewater on December 20th (see Appendix C)*.

The discomfort and privations suffered by the passengers because of the crowded conditions of the launch, no one is better able to narrate than the survivors themselves, who told in their own simple way how they were jammed in so close that they could not even move their limbs (Mit-

*The trial judge estimated that there were about 78 on board. This was before all the claims were filed.

chell, R., 974-975; Johnson, R., 980-984; Norgrove, R., 1107-1112; Barker, R., 1092-1105; Cooper, R., 1140-1156; Boots, R., 1215-1224; D'Arco, R., 1225-1235; Ludwig, R., 1272-1285). The seats were all occupied, and every square foot of floor space was taken. Men were standing on the steps, in the pilothouse, in the passageways, in front of the engine and around the engine. And could it be otherwise with 86 men on board a 45-foot launch?

Whatever may be petitioner's method of calculating the allotment of space to each passenger by including the roof of the cabin and the like, Petitioner's Exhibit 10 certainly confirms the testimony that the conditions on board were not other than described by the passengers.

PETITIONER'S EXHIBIT 10

Eighty-one persons were on the launch when this picture was taken shortly after the disaster (R., 709). It will be observed that the cabin and pilothouse are removed and that the men are standing without overcoats or lunch boxes.

Petitioner's expert Barrett was present at the time of the taking of this picture, and he testified:

> "Q. How many square feet of area would there be for the balance of those 81 men, do you think, if 36 were sitting down? A. The way I figured it out by trying to get 81 men on was putting them *on the stairway* and *in the upper part of the Captain's platform,* and in that way I got 81 on, and in that way I had an average of 2 square feet per man" (R., 709).

And petitioner's witness Capt. Dingle stated that with the cabin and pilothouse on as at the time of the accident, the carrying capacity of the launch was cut down by 10 men (R., 1809).* In other words, if the cabin and pilothouse were on when this picture was taken, 71 *men* would be just as crowded as the 81. Little need it be wondered, then, that with 86 or even 78 on board, the men were absolutely helpless in the event the launch met with *any* mishap.

And so it was on that day, when the launch came into sudden collision with an ice floe, breaking through her port bow. The only exit in the boat which opened outward was located at the bow—the exit in the rear opened inward (R., 582). But men were standing in the passageways, and to get out of the rear exit the men had to move away—and where were 86 men to move in an enclosed forty-five feet launch? The little glass windows, 15"

*See exhibit 5 reproduced at end of this brief showing destroyed cabin and pilot house.

by 22" (R., 580)—the so-called emergency exits were 4' above the deck (R., 707), and as petitioner's expert Barrett said—"You cannot do much climbing around in a crowd in two minutes" (R., 667). In addition, these little windows did not *slide* open. They were fixed in place by some sort of a chain contraption. The Court below referred to them as "allowing a doubtful egress" (R., 2365).

Some of the men who were able broke the glass and crawled out. Those who were near the port bow managed likewise, but all without life preservers. It was as though they had never been provided, for none of the men found it possible to stretch their arms in the crowd and reach for them (R., 974). Twenty-eight survived the struggle for life—twenty-seven men could not even make escape,—their bodies were found inside of the cabin when the launch was raised (R., 1056). The waters of the Hudson River still retain all but eleven bodies.

If the launch but carried her maximum number of sixty passengers, sixty men would not have lost their lives. If there were but sixty men on the boat, it is likely that more than twenty-nine would have survived. The sixty men would have had an opportunity to put on life preservers, and the loss of life would certainly have been mitigated, if not altogether avoided.

In the case of theatres where the dangers are certainly not as great as the perils likely to be encountered at sea, the crowding of passageways and aisles is condemned, and the owners is liable for any consequent injuries.

Sturgis v. *Coleman*, 77 N. Y. S. 886, 38 Misc. 302.

Nor is there any authorized practice for such crowding on vessels even where the vessels are built of steel and have watertight bulkheads.

The Valencia, 110 Fed. 221;
The Annie L. Vansciver, 161 Fed. 640.

The case of *The Valencia* (supra) was one in which a steamer having accommodations but for 375 passengers carried 475. It was there held that the shipowner was liable for the injuries suffered by the passengers by reason of such overcrowding. And this was the ruling, notwithstanding the fact that the shipowner had there obtained permission from a Local Steamboat Inspector to crowd the vessel beyond the limit of its proper accommodations.

Petitioner argues that all persons traveling on a ferryboat are not entitled to have seats. That is quite true. But our quarrel is not because all the men did not have *seats.* Fault is found because the petitioner suffered the men to be so crowded that they not only were deprived of the 7 sq. ft. of space allowed passengers on a ferryboat built of steel and having watertight bulkheads (R., 921-9), but they were deprived of the 3 to 4 sq. ft. of space which Mr. Charlton, the Local Steamboat Inspector, said was the minimum (R., 877)—moreover, they did not even have the minimum of the 2 sq. ft. which petitioner's witness Barrett allotted to them by frugal calculations (R., 700). With 86 people in an area of 113 sq. ft. (R., 1858), they had slightly over a single square foot per person. We fail to find any custom on the part of prudent shipowners which approves the bunching of human beings in such manner.

That a vessel becomes unseaworthy by reason of her overloading is well settled, and, when this is occasioned with his privity and knowledge, the shipowner will be denied the right to limitation and exemption from liability.

Weisshaar v. *Kimball SS. Co.*, 128 Fed. 397, (C. C. A. 9th C.);
The Benjamin Noble, 244 Fed. 95, affmd. C. C. A. 249 U. S. 334.

There can be no doubt that the overloading and the overcrowding in this case were permitted with the privity and knowledge of the petitioner. The undisputed testimony is that the captain was allowed to carry as many persons as there were life preservers or 86 passengers (Stover, R., 746, 777; Balz, R., 521; Aldrich, R., 566, 571; Rohweder, R., 344, 346). The launch had time and time again carried from 80 to 90 people (Johnson, R., 979; Lange, R., 1337; Kratovil, R., 932; Horn, R., 946; Dressler, R., 1178; Dingle, R., 1809-1810).

In the case of *Weisshaar* v. *Kimball SS. Co.*, 128 Fed. 397, the shipowner was denied limitation and exemption from liability where the evidence showed that the capacity of the boat was 14 persons without baggage, and that at the time of the accident it carried 18 persons, a trunk, 2 tool chests and 3 or 4 sailors' bags, and because such overloading was permitted by the officer of the corporation. We quote from the opinion:

> "Moreover, the evidence shows that the negligence of the officer in command of the boat was committed in the personal presence and within the actual knowledge of the president of the appellee corporation, who, so far from seeking to enforce the performance of his

duty by that officer, acquiesced in his neglect of duty, as affirmatively appears from the president's own testimony.

The limitation of liability provided for by the statute under which the present proceedings were had is, according to its express terms, to be allowed only when the loss, damage, or injury occurs 'without the privity or knowledge' of the owner. In the case of *The Republic,* 61 Fed. 109, C. C. A. 386, the privity or knowledge of the corporation consisted in the negligence of its president, who, by his omission of proper care in his examination of the vessel, failed to discover her defective condition; and the Circuit Court of Appeals for the Second Circuit there held that the injuries and death occasioned to the excursionist in that case could not be said to have occurred 'without the privity or knowledge' of the owner. We think that decision directly in point here. 'Privity and knowledge,' said Judge Brown in *The Colima* (D. C.), 82 Fed. 665, *'are chargeable upon a corporation when brought home to its principal officers or the superintendent,* who is its representative'" pp. 401, 402.

We submit that the case at bar presents a much stronger ground for a denial of the right to limit liability. In the *Weisshaar* v. *Kimball* case the negligence was that of an employee done with the *tacit* approval of the officer of the corporation. In the present case the act of overcrowding was committed with the *express* approval of Mr. Aldrich, the secretary and treasurer (Aldrich, R., 566) and Mr. Stover, petitioner's superintendent (Stover, R., 777-778). They authorized the captain to carry as many passengers as there were life preservers. It was not a question of the exercise of the captain's discretion. The captain was following the explicit directions of the managing agents of the petitioner.

Not unlike the case of *The Benjamin Noble,* 232 Fed. 382, affd. 244 Fed. 95, 249 U. S. 334, where the Court said at pages 397, 398:

> "Now, who was to blame for the overloading? This boat was owned by a corporation, and like all corporations, had to do business through some one representing the corporation. In this case that individual was Mr. Francombe, the managing agent of the corporation * * * he represented that corporation and handled that boat with the same authority and the same freedom that he would manage his own boat. So he stands, so far as this question is concerned, in place of the corporation, and his faults are the faults of the corporation, and binding upon the corporation. *Great Lakes Towing Co.* v. *Mill Transportation Co.* (C. C. A. Sixth Circuit, 1907), 155 Fed. 11. * * *
>
> It is urged that it was the captain's judgment that controlled in this matter, and that he was the one who decided the cargo, and not Mr. Francombe. I cannot agree with that contention. I think that the discretion which the captain used was no more than as to the trim of the ship; he decided whether he would stop at this particular car, or whether he would put on one more."

Eighty-six people were permitted to be carried in that launch. And yet neither Mr. Aldrich nor Mr. Stover ever took the trouble to determine how 86 men would fit in such a boat (Aldrich, R., 576-577; Stover, R., 745-747). Had the petitioner but made the same experiment, as indicated by the photograph, Petitioner's Exhibit 10, before the disaster rather than after it was too late, the petitioner would, or by the exercise of reasonable forethought could, have realized that eighty-six people could not possibly be carried with any degree of safety. For petitioner's

neglect to inform itself of the conditions of its launch, it will be denied the right to a limitation and exemption from liability.

The Republic, 61 Fed. 109;
The Teddy, 226 Fed. 498.

Insufficient Crew.

Some last minute testimony was offered by the petitioner to show that on this particular morning the captain was directed to make his first trip from New York at 6 o'clock, and then make another trip at 6:30 o'clock to pick up the regular help. There is no evidence that a 6 o'clock trip was ever before made. Moreover, the advertisements in "The World," asking laborers to meet the boat at 6.30 o'clock at the foot of 95th Street, entirely disproves it (Stover, R., 1938, Exhibit L). The so-called extra men who applied for employment on Saturday, December 18th, were told to meet the boat at 6.30 (Ludwig, R., 1281; Sullivan, R., 1345) and the regular employees always met the boat at 6.30 (Johnson, R., 978).

In this connection may it also be noted that the captain was given no list as to who were applicants for employment (R., 353). He was furnished no extra help to enable him even to count the 86 men that were permitted to be carried on the boat (Stover, R., 789). So that, even if a few more men than there were life preservers for, managed to get into the boat, the fault lies with the petitioner rather than with the captain.

It requires no expert testimony to show that it is wholly unreasonable to expect one man to take care of the boat, start the engine, handle his lines and manage a crowd of laborers (R., 326).

We refer to the ruling in the case of *The Annie L. Vansciver,* 161 Fed. 640:

> "This vessel was being used as a ferry steamer, over a route on which, by reason of the Jamestown Exposition, there was very heavy travel, and it was known to the officers that the vessel at this hour would be crowded to her full capacity, and the respondent should therefore, have provided commensurate safeguards against accidents such as occurred to the libellants * * *" pp. 641, 642.
>
> "With a vessel crowded as this was at the time of the accident, of which the respondent had full knowledge by reason of carrying the same crowd substantially daily, and the likelihood of danger to passengers, it should not escape liability for the failure to properly provide for the holding back and detention of the crowd in a place of safety until the boat could be made fast; and there was no excuse for allowing this crowd to fill up the entire standing space of the boat on all of her decks * * *" p. 643.

Petitioner knew, or should have known, that when it advertised for laborers on the morning of the accident, and just before Christmas, a crowd might certainly be expected. How was *one* lone man to handle the crowd and his boat at the same time? Petitioner had on previous occasions experienced difficulties with applicants for employment. Yet it took no measures to prevent overcrowding beyond that of calling in the police (R., 788-789), and now and then relied on some *volunteer* from among the employees to give the captain a hand (R., 382, 394). Petitioner still argues (p. 83 of its brief) that the sufficiency of the crew was entirely a matter in the discretion of the master. Claimants submit that the furnishing of an adequate crew was the non-delegable obligation of the petitioner.

We find sufficient authority upon this point also for an affirmance of the decree in this regard, *In re Pacific Mail SS. Co.*, 130 Fed. 76 (C. C. A. 9th). In that case limitation of liability was denied the owner for the failure to provide an adequate crew to take care of the exigencies that were likely to be encountered on a particular voyage. Judge Ross, in delivering the opinion of the Court, said at page 82:

> "It is, as was said by Judge Hawley, in *Re Meyer* (D. C.), 74 Fed. 885, 'the duty of the owners of a steamer carrying goods and passengers, not only to provide a seaworthy vessel, but they must also provide the vessel with a crew adequate in number, and competent for their duty with reference to all the exigencies of the intended route'; not merely competent for the ordinary duties of an uneventful voyage, but for any exigency that is likely to happen, such, for example, as unfortunately did happen in the present case—the striking of the ship on a reef of rocks—and the consequent imperative necessity for instant action to save the lives of passengers and crew. The duty rested upon the petitioner to be prepared for such an emergency, not only by reason of the statute cited, but by the general maritime law * * *" p. 82.

Owners and masters of vessels, who daily have the lives of hundreds of helpless human beings in their keeping, should be held to the strictest accountability and required to exercise the highest degree of skill and care. In this way alone can human life be safeguarded and such appalling disasters, as that which befell the "Linseed King," be effectually prevented.

POINT II

The men who applied for work several days prior to the disaster and were told to return on December 20, 1926, were not subject to the New Jersey Workmen's Compensation Act.

Petitioner contends that these men come within the provisions of the Workmen's Compensation Act of New Jersey, on the authority of *Sala* v. *American Sumatra Tobacco Company,* 93 Conn. 82, which holds:

> "* * * that 'an injury received by an employee while riding, *pursuant to his contract of employment,* to or from his work in a conveyance furnished by his employer, is one which arises in the course of and out of the employment.' "

The question in respect to these claims, however, is not whether the injury arose out of or in the course of employment, but whether the status of employer and employee had ever arisen. That question has been answered in the negative three times by two courts. After the decision of Patterson, D. J., petitioner moved for a re-argument on this issue. The motion was granted and briefs were again submitted and, after again considering the evidence, the Court reached the same conclusion that the relationship of employer and employee had never come into being (R., 225).

In the *Sala* case, the Court concluded from the evidence that the decedents were employed prior to the injury. This is also true of the other cases cited by petitioner.

The evidence here as given by petitioner's own witnesses is that, until the men actually started to work on December 20, 1926, there was no contract of employment.

Mr. McHale, petitioner's dock superintendent in charge of employment so testified:

> "Q. *These men never were really hired until they started to work,* that is, if you got them to go over and there wasn't any ship in at the time, or any work for them to do, you did not pay them any money? A. *No, not until they started to work.*
>
> Q. *So the actual contract of employment began when they started to work?* A. *Yes, sir*" (R., 1781-1782).

Petitioner's counsel, realizing that this testimony showed conclusively that the relationship of employer and employee had not arisen prior to the accident, objected to the answers of his own witness, but Judge Hazel said:

> "*The Court:* I think we ought to know whether they were employed when they came over, whether they were employed when they actually went to work or whether they were employed when they came over on the boat" (R., 1782).

On re-direct examination, petitioner's counsel endeavored to change McHale's testimony, but McHale only affirmed what he had testified to in the beginning:

> "Q. *Now, you said that the men were not employed until they got over to your side?* A. *That is right*" (R., 1784).

The testimony of Mr. McHale was corroborated by that of Mr. Stover, petitioner's managing superintendent:

> "Q. They are not actually engaged until they get on the other side? A. No.
>
> Q. And they can be rejected? A. Yes, sir" (R., 757).

These men whose names appear on Exhibit QQQ (R., 2351), designated as the "Saturday men," applied at peti-

tioner's plant on December 17, 1926. They were not put to work on December 17th, but were told to appear on December 18th. On December 18th, they again reported, and were told to return on December 19th. On December 19th, they reported, and were told to try again on December 20th, when the disaster occurred.

At no time were they told—"come back tomorrow to go to work," as petitioner would have it. They were merely told to report at the dock (R., 1770). They were not paid for going to or coming from petitioner's plant on the three days preceding the accident. They punched no clock and did no work (R., 2294). Their status is no different than the relationship that exists between an employer who, after interviewing an applicant for employment, informs him, "I can probably use you but I have no work for you at the present time—come and see me again tomorrow." The applicant returns day after day and is told the same thing. It is obvious that, if such an applicant applied for compensation for injuries he may have received while making these daily journeys to and from the prospective employer's premises, he could not recover.

To illustrate further—let us assume that on December 18th, after these men had arrived at petitioner's plant and were told there was no work and while they were on the "Linseed King" returning from Edgewater to New York, a disaster occurred, through no fault of Spencer Kellogg & Sons, Inc. If the claimants sought to enforce any rights under the New Jersey Workmen's Compensation Act, petitioner could have easily resisted these claims on the undisputed testimony that "the contract of employment arose only when the claimants started to work" (R., 1781-1782).

We submit that the situation was no different on De-

cember 20th, for they had not yet started to work when the disaster occurred. The fact that they were put off from day to day without being paid rules out the contention that there was any definite contract of hiring, and proves beyond a doubt that until claimants actually began work on December 20th, there was no contract of employment.

That in one or two instances the claims may have initially contained allegations that a particular claimant was employed does not establish the fact. Petitioner filed objections to the allegations in all claims, and the parties were put to their proof (R., 120). The burden was on the petitioner to prove that the New Jersey Workmen's Compensation Act was applicable and, as part of such proof, to establish that the status of employer and employee existed prior to the disaster. Indeed, the contrary was established by claimants through petitioner's own witnesses (Aldrich, R., 2288; McHale, R., 1769-1770; Stover, R., 729). And see also the testimony of Ice, R., 2316.

The Contract of Employment, if any, was Maritime.

Even if we assume for the purpose of argument that a contract of employment was entered into prior to December 20, 1926, the Workmen's Compensation Act would be ineffective because the men were to be engaged to unload a ship. The evidence on this point is overwhelming.

Mr. Aldrich, secretary of Spencer Kellogg & Sons, Inc., testified before the Commissioner as follows:

"Q. Mr. Aldrich, this Exhibit QQQ endorsed in evidence at the Limitation Proceedings January 31st,

1928, is that a list of the men *who were employed to unload the boat?* A. Yes" (R., 2288).

And Mr. Stover, petitioner's managing superintendent, testified:

"Q. When you had extra men that came on this boat, what were they employed for, generally speaking? A. *Generally for unloading seed ships,* that is, ships that brought flaxseed from South America.

Q. About how many men did you need for one of those ships, extra men? A. We would usually get about 50 men from New York on a shift.

Q. Would the number of men you needed to *unload a ship* be affected by the number of presses you had? A. No, sir" (R., 729).

That these men were not needed by petitioner except to unload the Steamer "Tercero" appears plain enough also from the testimony of Mr. McHale before Judge Hazel, as follows:

"Why, Sunday morning we expected the steamship 'Tercero' to dock there, and it was supposed to come in at 8 o'clock in the morning. I arrived there about quarter to eight, and the boat wasn't in sight; so I called Mr. Stover and told him the ship was not around, and I could not see it down the river. He told me to call the Dalzell Towing Company up and find out what they knew about it. I called the Dalzell Towing Company up about quarter after nine and they told me the boat was at quarantine at about 9 o'clock that morning, and would arrive at our piers between half past eleven and twelve o'clock. Then *I told them I had some men there waiting to go to work on that boat,* and I did not think I needed to keep

them there, and I wanted to send them away, and he said, all right, to send those men back to New York and have them report at the dock tomorrow morning at 6 o'clock, and have me to tell Mr. Rohweder when I saw him at 5 o'clock Sunday evening about it. That would be that same night" (R., 1769-1770).

The testimony of the survivors is also to the effect that their work was to be the unloading of the Steamship "Tercero" (Ludwig, R., 2170; Mitchell, R., 2182; Sullivan, R., 1346).

It was not necessary for claimants to go through the formality of proving in each instance that claimants or claimants' intestates were employed to unload a boat. It was sufficient, in the light of the testimony of petitioner's witnesses and the survivors, to show only that their names appeared on Exhibit QQQ, which was petitioner's list of the so-called "Saturday men," who were engaged to unload the vessel (Aldrich, R., 2288; McHale, R., 1769-1770; Stover, R., 729).

The work of unloading a vessel is maritime and the Workmen's Compensation Act cannot supply the remedy.

Southern Pacific Co. v. *Jensen*, 244 U. S. 205;
Northern Coal Co. v. *Strand*, 278 U. S. 142.

And this is true even though claimants might have at some time during the course of unloading the ship worked on the dock. It was so held in *Northern Coal Co.* v. *Strand*, 278 U. S. 142, as follows:

"The unloading of a ship is not a matter of purely local concern. It has direct relation to commerce and

navigation, and uniform rules in respect thereto are essential. *The fact that Strand worked for the major portion of the time upon land is unimportant. He was upon the water in pursuit of his maritime duties when the accident occurred* (p. 144)."

Petitioner argues, on page 62 of its brief, that the "maritime situs of the accident during transportation to work cannot be coupled with the maritime nature of the work." This is wholy inconsistent with its argument "that the accident arose out of and in the course of their employment" (Petitioner's brief, p. 41).

Moreover, it has been decided in the case of *Baker Tow Boat Co.* v. *Langner,* 1928 A. M. C. 1499 (Sup. Ct. State of Alabama), that, where an employee engaged to do maritime work is injured while being conveyed to his place of work on the employer's vessel, the jurisdiction of the admiralty court attaches and is exclusive.

In that case the claimant was a carpenter employed to work on repairs to a vessel in dry dock. He was injured while being towed to his place of work on the employer's tug boat. He claimed compensation under the Alabama statute. The Court of Appeals awarded compensation to claimant. A petition for writ of certiorari was allowed. The Supreme Court reversed the decision of the Court of Appeals on the ground that the employment and the place of injury were maritime and the remedy given in admiralty was exclusive. The case of *Alaska Packers Association* v. *Industrial Accident Commission,* 276 U. S. 467 and *State Industrial Commission* v. *Nordenholt Corporation,* 259 U. S. 263, cited by petitioner, are not to the contrary.

Finally, under the decision of this Court, in *Hartford Accident & Indemnity Co.* v. *Southern Pacific Co.,* 273 U. S.

207, the so-called "Saturday men," together with all other claimants, were entitled to a recovery in the limitation proceeding into which they had been brought *in invitum*, for, as this Court said:

> "If Congress has constitutional power to gather into the admiralty court all claimants against the vessel and its owner, whether their claims are strictly in admiralty or not, as this court has clearly held, it necessarily follows as incidental to that power that it may furnish a complete remedy for the satisfaction of those claims by the distribution of the *res* and by judgment *in personam* for deficiencies against the owner, if not released by virtue of the statute" p. 217.

This point has been fully covered in the brief submitted in Case No. 444 (Vera Alexander, administratrix of the Estate of James Alexander, deceased, et al, against Spencer Kellogg & Sons, Inc.).

Conclusion.

The decree of the District Court, in so far as it adjudges the petitioner liable without limitation and awards damages to certain claimants, should be affirmed with interest and costs.

Respectfully submitted,

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Proctors for Claimants-Appellants.

ELIZABETH ROBINSON,
Of Counsel.

APPENDIX.

Summary Review of the Evidence.

A. Ice in the Hudson River.

The following witnesses testified as to the presence of ice in the Hudson River on the day of the disaster and prior thereto:

Capt. Monte Kearney, associated with the Yonkers Ferry Co. for 22 years, saw ice on December 20th, and about a week prior thereto (R., 838, 839).

Robert Oliver, Jr., Superintendent of operation for Cornell Steamboat Co., that on December 4, 1926, 16 days before the accident they had encountered difficulty with ice in towing (R., 850, 854).

Capt. Willis S. Hill, Master of the U. S. Steamer "Manisees," whose duty it was to go around the harbor and pick up rafts, wrecks, etc., saw ice in the river as far back as December 14th (R., 886-887, 893).

Albert E. Potter, Superintendent of Hudson River Day Line, 129th St. Pier,—there was ice in the river between 129th Street and Fort Lee Ferry for 10 days previous to the accident (R., 911-912).

Samuel Quinn, Storekeeper, Interstate Park Commission, had entries in his log book showing ice a few miles above Edgewater on December 18th (R., 917-920).

Thomas J. Lennon (12th Precinct) was on duty on Riverside Drive in the vicinity of the accident,—there were ice floes in the river a week or a week and a half previous to the accident (R., 1024).

Michael J. O'Toole, Shield No. 6411, was on duty at 125th Street, he had a view of the Hudson River,

there was ice in the river about a week prior to the accident (R., 1027).

George D. Gray, Chief Officer of the "Chauncey M. Depew," located at Hudson River and 129th Street,—beginning with December 15th the river was full of ice (R., 1030, 1032).

George V. Cook, Mgr. of Dyckman Street Ferry, saw ice on December 19th (R., 1122).

Russel F. Peterson, Pilot of the Yonkers Ferry, ran his boats through the ice 2 or 3 days previous to December 19th (R., 1071).

Joseph S. Pray, Watchman of the Hudson River Day Line, whose duty it was to look for ice in the harbor, saw ice in the vicinity of the pier for 4 or 5 days before the accident (R., 1114).

John F. Amter saw floating ice a few days before the accident (R., 1268).

Alfred C. Smith, Captain of the City Fire Boat "Mitchell," saw ice in the river 2 or 3 days before the accident (R., 1341, 1342).

George F. Pollard, employed by the City of New York as dock master at 96th Street, saw floating ice in the river on Saturday previous to the accident (R., 1244).

In addition to these witnesses, survivors Cooper (R., 1138), Ludwig (R., 1279), Boots (R., 1221), D'Arco (R., 1231) and petitioner's pilot Lang (R., 2344), encountered ice on Saturday and Sunday previous to the disaster in making the trip to and from petitioner's plant across the Hudson River.

The Weather Report records (Exhibits E and F) confirm the freezing temperature beginning with December 2nd, 1926.

The testimony on behalf of the petitioner corroborates rather than contradicts claimant's proof. Frank A. Chrisler, a dispatcher of the New York Central Railroad Co., saw ice in the river on December 18th as far down as 59th Street (R., 1714, 1722). Howard P. Fort encountered ice on December 19th (R., 1742). Their only other witnesses, Louis Sayer, Albert Schmidt and Henry Erickson, saw no ice in the river even on December 20th, when the presence of ice in the river was sufficient to keep afloat some 28 survivors.

B. Carrying Capacity of the "Linseed King."

The carrying capacity of the "Linseed King" was calculated by petitioner's own witness Barrett. He concluded that by very snug crowding the launch could seat 36 men (R., 680). That after deducting the space occupied by the seats, the available floor space for men to stand in was 63 sq. ft. (R., 699). In determining the number of men that could stand in this area of 63 sq. ft., he allowed a minimum of 2 sq. ft. per person (R., 700-701), or a standing capacity of 32 men.

Mr. Charlton, Supervising Inspector General of the Steamboat Service in New York, called as a witness, was shown Petitioner's Exhibit 10 (a photograph of an experiment in which 81 men were jammed into the boat with the cabin and pilot house removed) and he said—

> "I have never seen a condition like that quite" (R., 871)—

and, when asked how many square feet he would allow for each person, he answered—

> "I would consider that 4 square feet per person would give ample room. It is just possible, accord-

ing to the arrangement of the people, or the number of people who are in the load, it might work down to 3 square feet with room to handle those, but I do not imagine that it would be any less than that. I imagine that would be the limit. But 4 I would consider would give them sufficient room" (R., 877).

He further testified that on excursion boats, 9 square feet per person was generally allowed (R., 881-882).

On the basis of 4 sq. ft. to a person, the "Linseed King" would be permitted to carry about 50 passengers; and this seems to be in keeping with the carrying capacity permitted similar launches, according to the records of the Local Steamboat Inspectors (R., 1015-1020), and summarized as follows:

Name of Vessel	*Measurements* *Length*	*Tons*	*Number of Passengers Allowed*	*Crew*
Aljohn	45.1′	26	48	3
Atlas	56′	26	48	4
Comfort	60′	17	40	3
Doris	56.6′	28	137	
(double deck steamer 1270 sq. ft.)				
Grace Phillips .	41′	18	45	
Glory	44.5′	15.97	50	
Hercules	33.5′	17	19	2
Kid II	45.5′	15	60.	4
Strangera	74′	27	45	3
Ventura.	59.7′	22	66	3
Lydia R	44.8′		67	4
Mariquita . . .		18	45	2
The Olga	41.1′	15.14	49	2
The Pansy . . .	43.5′	20	58	2

By comparison—the "Linseed King," 42.5′ long, 16.75 gross tons, carried and was permitted to carry 86 passengers (R., 344, 346, 521, 571).

As to the weight to be given to Mr. Charlton's testimony, petitioner's counsel said: "I suppose if there can be an expert on this sort of thing, Capt. Charlton is it" (R., 1968).

Calvin Crocker, Chief Engineer of the New York City Ferries, testified that in his opinion he did not consider 2 sq. ft. per person sufficient (R., 927); that the amount of space allowed per passenger on a ferry boat was 7 sq. ft. (R., 922-923). Concerning the testimony of this expert, petitioner's counsel said: "I submit Mr. Crocker's (name misspelled Trotters) evidence on that point is entitled to great weight" (R., 1968).

Mr. Brazel, a naval architect, testified that in his opinion the "Linseed King" could carry a maximum of from 50 to 60 people (R., 1543-1544).

August Rietzke, a boatbuilder of considerable experience, testified that taking into consideration the "Linseed King" was completely enclosed, with little glass windows which opened inward, she should not carry more than 40 passengers (R., 1393).

Prior to the testimony given by these experts, petitioner had established by sufficient proof that the "Linseed King" was permitted to carry as many passengers as she had life preservers, Rohweder (R., 344, 346); Balz (R., 521); Aldrich (R., 571), or in other words 86 passengers (R., 344-346).

The petitioner thereupon found it necessary to recall Mr. Barrett to make room for the 86. He found that by including the space midair above the seats, each passenger

would be allotted some 4 sq. ft. (R., 1825-1837). There was however, no evidence that the space above the seats in midair could be utilized to stand on by human beings. As a matter of fact, when Mr. Charlton, the steamboat inspector, was asked by petitioner's counsel whether the space above the seats was to be included in figuring the space allotment for passengers, he answered:

> "I cannot recall a boat of that kind where we have been called upon to determine the number of passengers by that means" (R., 883).

In the course of examination of the witness Barrett, it became apparent to the Court that there was a conflict in his testimony, for, according to his original calculations, the "Linseed King" could carry but 67 passengers (R., 706). He attempted to explain the discrepancy by saying that in his previous figures he had made very elaborate deductions. We refer to his original testimony to see what margin of space he did leave:

> "Q. So you have 63 square feet of space inside that cabin? A. Yes; at least.
>
> Q. Yes? A. At least.
>
> Q. And that has been fairly reasoned out? A. Yes, with good margins all round.
>
> Q. What do you mean by a good margin? We have not left but 6 inches there. A. *There is always a little room between men's feet*" (R., 699-700).

And he was asked one further question:

> "Q. Would you put more people in, bearing in mind all those things, than the 67 we figure to put in here? A. No, sir" (R., 706).

The only other witnesses called by the petitioner were Hale and Clayton. Mr. Hale's experience (if any) was exclusively with naval launches,—open boats with bulkheads, carrying but one type of passenger—disciplined sailors, which the witness himself said was an element to be considered (R., 1904-1906).

As far as Mr. Clayton is concerned, he testified that the boat would carry 90 people, but that he based his figures upon the assumption that 60 people could be seated (R., 1883). Not only is this a mathematical absurdity, but it finds no favor even with petitioner's witness Barrett, who could seat 36 only by snug crowding (R., 680).

C. Overloading of the "Linseed King."

As to the presence of approximately 86 people on board the "Linseed King" at the time of her sinking, there was overwhelming proof*:

27 bodies were recovered from the vessel (R., 1056);
4 bodies were taken from the river on the same date (R., 1056, 1057);
28 survivors—exclusive of the Captain (R., 1056);
7 bodies were subsequently washed ashore as follows:
(Marques, R., 2038; Wisdom, R., 2075; Murphy, R., 1664; Coyle, R., 1603; Martin, R., 2118; Kakos, R., 2234; Ramsland, Exhibit 1.)
20 bodies were not recovered but whose presence on the "Linseed King" was established by sufficient and uncontradicted proof.

86 Total

* Judge Hazel approximated the number of persons on board the vessel as 78. This was before all of the claims were filed and a complete list obtained.

The names of the 20 bodies not found and the pages at which undisputed testimony was given as to their presence on the boat are as follows:

Burns (R., 985, 2310); Cascaden (R., 1670); Castro (R., 1666); Griffith (R., 1101); Ifill (R., 1091, 1101); Jordon (R., 1101, 1111); Kreminsky (R., 2119-2120); Martin, E. (R., 1551); Mathias (R., 1552); Morales (R., 1572); Munoz (R., 1666, 2310); McEachin (R. 986); Eladio Ortiz (Misspelled Martines) (R., 1666); Rawlins (R., 1105); Rosa (R., 1666); Samuels (R. 1597); Sumner (R., 1552); Thigpen (R., 1564); Turner (R., 1661); Venegas (R., 1589).

This number is corroborated by other proof: Seventy-eight claims were filed with the Commissioner, only one of which (Leibold) was disallowed because of failure of proof as to his presence on the "Linseed King" (Com. Rep. 24). There were also two survivors, Jones and Vega, who did not appear before the Commissioner to prove their claims, but the Police Blotter (List of Survivors—Exhibit NN) listed them as having been on the vessel.

There were also three persons who lost their lives, for whom no claims were filed: Stevenson (R., 2353); Rosa (R., 1666) and Cascaden (R., 1670).

In addition, the following survivors of the "Linseed King" filed no claims: Zamudio, Caracas, Garcia, Trotter, Venezuela and Riquelme (listed on Police Blotter—Exhibit UU). Three of these witnesses—Trotter, Venezuela and Riquelme were witnesses for the petitioner.

That there were more than 80 persons on board the vessel is further supported by the testimony of the survivors, Cooper (R., 1148); Mitchell (R., 967); Barker (R., 1092); Boots (R., 1222); Lange (R., 1333); Ludwig

(R., 1274). They estimated that there were from 80 to 100 people on the vessel and so jammed together that they could not even get a handkerchief out of their pockets Charles (R., 1304).

But the day of the disaster was not the first time that the petitioner had committed the offense of carrying more than 80 persons. Johnson, who had been working for the Company for two years and who was still employed by the petitioner at the time of the trial, testified that whenever there was a seed ship in, the launch carried from 85 to 90 men (R., 979). The testimony of Bernard Lange, who had been there for seven months and who was still working for the petitioner, testified that the boat was similarly overcrowded whenever a seed ship came in (R., 1337). And to the same effect is the testimony of Kratovil (R., 932); Horn (R., 946-947); Dressler (R., 1178); Dingle (R., 1809). Fred Lange, who made an affidavit for the benefit of petitioner, said that whenever there was a seed ship in the launch carried from 80 to 90 people (R., 1632).

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